point at which the accident complained of occurred, or to give notice of same to plaintiff's intestate or to any one else in his situation.

This count is further demurrable because the statement that it was the duty of defendant not to run its engine on a changed schedule, or, if so run, notice should have been given *et cetera*, is alternative pleading, and is not permissable.

This count is further demurrable because it fails to aver that the failure in this regard, on part of defendant, was the proximate cause of the injury complained of, and failed to aver any fact or circumstance from which it could be inferred, that such failure was the proximate cause of said injury.

(7) The sixth count fails to aver any fact or circumstance, because of which, there existed the duty, on part of defendant, to abstain from running its engine on the day, and at the time of the accident, and that this duty was due the plaintiff's intestate. It fails to show that the failure to abstain, etc., was the proximate cause of the accident. It not only does not show a cause of action, by plaintiff against defendant, but negatives it by alleging facts which show the contributory negligence of plaintiff's intestate, which negligence was the proximate cause of the injury complained of.

(8). The seventh count fails to aver any fact or circumstance, because of which, as between defendant and plaintiff's intestate, there existed the duty to sound its whistle sharply, at least twice, not less than 300 yards from the highway crossing referred to. It fails to aver that the failure of defendant, in this regard, was the proximate cause of the injury complained of, and fails to aver any fact or circumstance from which it could be inferred that such failure was the proximate cause of the injury.

Wherefore &c.

VIRGINIA-CAROLINA RW'Y CO.,
By Counsel.

WHITE & PENN.

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## VIRGINIA & S. W. RY. CO. v. CLOWERS' ADM'X.*

*Supreme Court of Appeals.*

June 16, 1904.

RAILROADS—MASTER AND SERVANT—FELLOW SERVANTS—CONSTITUTIONAL RULE—LOCOMOTIVE ENGINEER AND TELEGRAPH OPERATOR.

1. Const. section 162, in effect relaxing the stringency of existing precedents as to fellow servants, in the interests of employes of railroad companies, is not to be strictly construed, but the true method of construction is to discover the intention of the framers of the Constitution.

* Reported by West Publishing Company.

2. Const. section 162, declares that a servant employed by a railroad company, and engaged in any work in the operation of an engine, shall be entitled to recover for injuries sustained because of the negligence of any one charged with dispatching trains or transmitting telegraphic or telephonic orders therefor. *Held,* that a railroad company is liable to a locomotive engineer for injuries caused by the failure of a telegraph operator to transmit an order sent out from the train dispatcher's office in regard to the movement of trains.

Appeal from Corporation Court of Bristol.

Action by W. B. Clowers' administratrix against the Virginia & Southwestern Railway Company. Judgment in favor of plaintiff, and defendant brings error. *Affirmed.*

*Bullitt & Kelley* and *D. D. Hull,* for plaintiff in error.

*H. G. Peters, W. F. Rhea,* and *E. Lee Trinkle,* for defendant in error.

WHITTLE, J.

This is an action of trespass on the case, brought by the administratrix of W. B. Clowers against the Virginia & Southwestern Railway Company, to recover damages for the alleged negligent killing of plaintiff's intestate by the defendant company. The jury rendered a verdict in favor of the plaintiff for $5,000, the judgment upon which is the subject of review.

It is conceded that plaintiff's intestate, who was a locomotive engineer in the employment of the defendant company, lost his life in a collision between two of the trains of that company, occasioned by the failure of its telegraph operator at Big Stone Gap to transmit or deliver an order sent out from the train dispatcher's office at Bristol to the conductor of one of the colliding trains. The single question, therefore, presented for decision is, were the telegraph operator and the engineer fellow servants, in contemplation of section 162 of the Constitution of Virginia?

The trial court instructed the jury that "if they believed from the evidence that the operator of the defendant company failed to deliver the message to the conductor on the train coming from Big Stone Gap to Bristol, and that by reason thereof the accident resulted which caused the death of plaintiff's intestate, then they should find for the plaintiff."

The instruction, it will be observed, was equivalent to telling the jury that plaintiff's intestate and the telegraph operator were

not fellow servants, within the meaning of section 162. Counsel admit that prior to the promulgation of the Constitution, July 10, 1902, the parties would have been declared fellow servants, under the decisions of this court, and there could not have been a recovery against the company upon the facts of this case. The controlling question, then, is whether or not the telegraph operator falls within any of the exceptions of section 162, taking him out of the category of fellow servant of plaintiff's intestate.

The section reads as follows:

"The doctrine of fellow servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a non-assignable duty: provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent, of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the co-employee through, or by, whose act or omission he is injured; or that it result from the negligence of a co-employee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or non-assignable duty. The physical construction, repair or

maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operation of trains, cars or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defence to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance as vice-principal, of a non-assignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the General Assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend the rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation."

The defendant company insists, that, inasmuch as the foregoing section tends to increase the common-law liability of railroad companies, it ought to be strictly construed, and that, when so construed, it leaves unchanged the relations which previously existed between these employees. Whatever may be said of the soundness of that proposition with respect to the construction of statutes in derogation of the common law, the rule has no application to remedial provisions of a Constitution ordained for the obvious purpose of relaxing the stringency of existing precedents in the interest of employee engaged in the dangerous occupation of con-

structing, maintaining and operating railroads. The constitutional convention, in its wisdom, has deemed it salutary and just to employees to modify the common-law fellow-servant doctrine so as to meet the exigencies arising from changed conditions in modern railroading. Under such circumstances it is the duty of the courts to give effect to that policy, rather than to defeat it by resort to narrow and technical rules of construction. The true purpose of construction is, at last, to discover the intention of the framers of the Constitution, and to promote the objects for the attainment of which that instrument was ordained; and, to that end, a fair interpretation must be given to the language employed, construing the words in their ordinary and popular acceptation, unless it clearly appears that they were intended to be used in some other sense. When language is plain and its meaning obvious, there is no room for construction. The proper rule for the exposition of a Constitution is thus stated by Judge Cooley in his work on Constitutional Limitations:

"It is also a very reasonable rule that a State Constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes. It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent—but there can seldom be either propriety or safety in applying this maxim to Constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter common law further than is expressly declared. A reasonable construction

is what such an instrument demands and should receive, and the real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." Cooley on Const. Lim. (7th Ed.) p. 94.

In light of these principles, this court has no difficulty in expounding that part of section 162 applicable to the case in judgment. The clause, in terms, abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or ommissions of a co-employee "charged with dispatching trains or transmitting telegraphic or telephonic orders therefor." The object of train dispatching is to place in the hands of conductors who manage the trains of the company proper and safe orders for their guidance. The source of such orders is the office of the train dispatcher, from which they emanate, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is *in transitu* from the time it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination. There can be no reason for holding, under the language of this provision, that a train dispatcher is not a fellow servant of the trainmen to be affected by the order, but that a telegraph operator, through whom the order is to be transmitted to the conductor, and the trainmen are fellow servants. Each constitutes part of a conduit through which the order is transmitted from its source to its destination, and the omission of either to discharge his important function defeats that object. The purpose of the provision is to hold the company responsible for the consequences of the negligence of its agents in dispatching trains or transmitting orders, and there is nothing in the language employed to justify the contention of the company that no operator on the line, except the dispatcher in the train dispatcher's office, is charged with the duty of dispatching trains or transmitting telegraphic orders therefor.

If "transmitting orders" for the movement of trains is, as contended, synonymous with "dispatching trains," there was no necessity for the use of both terms in the connection in which they occur. Nor is any authority adduced in support of the proposition that "transmitting" an order is to be construed to mean transmitting it by telegraph only. To subject the provision to that re-

stricted interpretation would not only do violence to the language used, but would also defeat the manifest object of the framers of the Constitution. The clause means what the words import, and includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to the conductors of such trains, no matter what instrumentalities may be employed to accomplish that purpose. It would be a vain thing for the framers of the Constitution to protect trainmen against the negligence of a train dispatcher, and leave them exposed to the carelessness of other agents of the company, through whom the train dispatcher's orders must be transmitted before reaching their final destination.

The judgment complained of is plainly right, and it must be affirmed.

NOTE.—Two points of especial interest are decided in this case:

The first is that section 162 of the Constitution of 1902, changing the existing doctrine of fellow servants, is not to be construed *strictly* but *reasonably*, and that the courts must seek to discover the intention of the framers of the Constitution, and promote the objects for the attainments of which that instrument was ordained.

It has been held in a few cases—e. g., *Brown* v. *Fifield*, 4 Mich. 322—that constitutional provisions in derogation of the common law—like statutes with a similar purpose—are to be strictly construed. This doctrine would make the common law superior to the Constitution of the State, and would "represent the Constitution as something imposed upon and drawing its life from the common law. On the contrary, the true conception of the State government regards the Constitution as the fundamental law of the State, and the common law as existing in and part of the jurisprudence of the State by the express or implied consent of that Constitution; in other words, the Constitution recognizes the common law, and not the common law the Constitution." Sedgwick on Construction of Stat. and Const. Law (2d ed.), Pomeroy's note, p. 267. And while in construing Constitutions, the common law is to be kept in view, and the construction is to be made with reference to the principles, definitions and rules of the common law, the construction must not be allowed to subvert the intention of the people, as expressed in the Constitution. 8 Cyc. 383; Cooley on Const. Lim. (7th ed.) 94.

The second point decided is that, under section 162 of the Constitution of 1902, a locomotive engineer and a telegraph operator are not fellow servants, whereas prior to the promulgation of the Constitution, July 10, 1902, they would have been held fellow servants, under the decisions of the court. It is difficult to see how the court could have come to any other conclusion, even under a strict construction of the aforesaid provision.

C. B. G.